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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN H. BURNETT,
HARRY LEVIN,
Counsel for Petitioner.

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26 U. S. C. A., Sec. 145 (b), 53 Stat. 62 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

Joseph Friedman, petitioner, hereinafter called the defendant, prays that a writ of certiorari be issued to review the judgment entered October 6, 1941, in the United States Circuit Court of Appeals for the Third Circuit. (R. 630)

Judgment Below.

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Jurisdiction.

The jurisdiction of the court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925, (43 Stat. 938, 28 U. S. C. A. Sec. 347) and under Rule 38 of the Revised Rules of the Supreme Court of the United States. The opinion of the Circuit Court of Appeals for the Third Circuit was filed October 6, 1941, and this Petition was filed November 8, 1941. The opinion of the Circuit Court of Appeals for the Third Circuit is included in the record certified to this Court. (R. 629)

Statement of Case.

In stating the case, counsel have had difficulty in avoiding argument, due to the fact that the points relied upon are of such nature that it is necessary to point out certain deficiencies in the record in order to make defendant's position clear to the court.

The defendant was indicted for willful evasion of his individual income tax, in violation of 26 U. S. C. A. Sec. 145(b), 53 Stat. 62, which provides:

> Any person required under this chapter to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect, or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

The indictment was in three counts, the first charged willful evasion for the year 1935, the second for 1936 and the

third for 1937. (R. 9-17) Defendant was convicted on all counts, (R. 626), and was sentenced to imprisonment for ten years and to pay a fine of $20,000 and the costs of prosecution. (R. 627-8)

It is admitted by the defendant that the record shows that the defendant was engaged in two gaming enterprises in 1935, 1936 and 1937, namely, that of "numbers" and that of "penny hearts", crimes prohibited by the laws of the State of New Jersey. The defendant had two partners in the "numbers" business, Leroy Williams and Herndon Daniels. The defendant received one-half of the proceeds of the partnership, Williams and Daniels received one-fourth each.

The defendant complains.

1. Of the admission in evidence of Government Exhibit 4 (R. 587-591), the "Partnership Return of Income" of "Daniels, Williams & Friedman" for the year 1937, and of the instructions of the court that said "partnership return *was filed by the defendant* and his partners" (R. 555), and that such filing of said return could be considered by the jury "as some evidence that he (the defendant) endeavored to evade his own income tax for the year 1927." (R. 556), because the record fails to show that defendant had any guilty knowledge of, or was a party to, the preparation, the making or the filing of that fraudulent partnership return and because the record fails to show that the defendant aided or abetted, or was accessory before or after the fact to the preparation, making or filing of the fraudulent partnership return by his copartner Leroy Williams;

2. Of the charge to the jury on reasonable doubt (R. 557), because the court then warned the jury: "To justify acquittal it (reasonable doubt) must be substantial in view of all the evidence and not a mere possibility of innocence."; and

3. Of the refusal of the defendant's request to charge that the burden was on the prosecution to prove every material element of the crime charged beyond a reasonable doubt (R. 565, 561). The court charged: (R. 554)

> There are two elements in this crime, this alleged crime, two principal elements at least, and I think you need concern yourself only with those two elements. The first is that the defendant owed a tax. The second that he willfully attempted to evade or defeat that tax. You must first find that he owed a tax, a tax in excess of the tax paid by him, and secondly, you must find that he willfully attempted to evade or defeat the tax before you can find him guilty.
>
> Now, the word "willful" is used in that statute in its ordinary and common meaning. It means exactly the same to you as a member of the jury, as laymen, as it means to me as a judge, but so there will be no mystery about it, I think I had better read you very briefly a very small section of a case in one of the courts of appeals.
>
> Of coarse, the question of willfullness is a question of intent. Did he intend to do willfully what he is charged with doing? And on income tax questions this has been stated, and this is a correct interpretation of the law: "Questions of intent of this character are for the jury, and willful intent in failing to file a return may be supported by the circumstances surrounding this case. Direct proof of willfullness is not necessary to establish guilt in income tax proceedings."
>
> * * * * * * *
>
> (R. 559): In order for an attempt to evade or defeat a tax or the payment thereof to be "willful under the statute, not only must an obligation exist to pay a tax on net income actually received, but there must also be a specific wrongful intent, that is, actual knowledge on the part of the defendant of the existence of such obligation. This is the very essence of the statutory crime charged.

To summarize: The court first charged that there were "two elements" in the crime, "two principal elements *at least*" and later told the jury that the very essence of the crime was "actual knowledge" by the defendant of an obligation to pay the tax and "a wrongful intent" to evade the tax. The court first told the jury that "willful" as used in the statute defining the crime was used in its "ordinary and common" meaning and again that "willful" meant an "actual knowledge".

Questions Presented.

1. A) Is a Partnership Income Return (G-4, R. 587-591) supposedly prepared, made, signed and filed by one copartner admissible against a defendant,

B) Is it evidence of willful evasion of the defendant's individual income tax,

C) Can the trial court say to the jury that "the partnership return was filed by the defendant and his partners"

When:

a) The partnership was engaged in a single illegal enterprise prohibited by a State statute, namely, gaming;

b) The defendant is charged with willful evasion of only his own individual income tax;

c) There is no proof of guilty knowledge by the defendant of the preparation, making, signing or filing of the partnership return by his copartner;

d) There is no evidence that the defendant was an accessory before or after the fact to the preparation, making, signing or filing of the partnership return by his copartner?

2. Is it reversible error for the court to instruct the jury: "To justify an acquittal it (reasonable doubt) must be sub-

stantial in view of all the evidence and not a mere possibility of innocence''?

3. Where the defendant in a criminal trial requests the court to charge the jury that the burden of proving every material element of the crime charged, beyond a reasonable doubt, is upon the prosecution,—is it then sufficient for the court to state to the jury that which the court considers to be the material elements of the crime, yet (a) fail and refuse to tell the jury all of those material elements must be proved beyond a reasonable doubt, and (b) state all of the material elements of the crime in such a manner as to confound and confuse the jury?

Reasons for Granting the Petition.

By its opinion, the United States Circuit Court of Appeals for the Third Circuit has approved the doctrine (1) that a fraudulent Partnership Income Return (G-4, R. 587-591), supposedly prepared, made, signed and filed by one co-partner is admissible against all partners engaged in business with him—business made illegal by a State statute—regardless of whether or not the partner on trial for willful evasion of his *individual income tax* had guilty knowledge of the Partnership Return, or was an accessory before or after the fact to the preparation, making, signing or filing of the Partnership Return by a copartner; (2) that under such circumstances the fraudulent Partnership return is evidence of willful evasion of the defendant's *individual* income tax; and (3) that the court can invade the province of the jury. Therefore, said opinion is in conflict with established law.

Sleight v. *U. S.*, 87 F. 2d 459, 461, 65 App. D. C. 203.

By its opinion, the said United States Circuit Court of Appeals approved an instruction of reasonable doubt which is contrary to the weight of authority.

Paddock v. *U. S.* (C. C. A. 9), 79 F. 2d 872, 876;
Boatright v. *U. S.* (C. C. A. 8), 105 F. 2d 737, 740.

By its opinion the said Circuit Court of Appeals held that misleading and confusing instructions to the jury, which were contrary one to the other, were proper. That is in sharp conflict with this court and with the weight of authority.

Mills v. *U. S.*, 164 U. S. 644, 649, 17 S. Ct. 210, 41 L. Ed. 584;
Dr. J. H. Mc Lean Medicine Co. v. *U. S.* (C. C. A. 8), 253 F. 694, 696, 165 C. C. A. 288;
Nicola v. *U. S.* (C. C. A. 3), 72 F. 2d 780, 787.

By its opinion, said Circuit Court of Appeals held that a jury need not be told that every material element of a crime need not be proved beyond a reasonable doubt, before a defendant in a criminal trial can be convicted. That is counter to established principles of law.

Mc Afee v. *U. S.* 105 F. 2d 21, 31, 70 App. D. C. 142.

By its opinion, the said Circuit Court of Appeals held that a court could tell the jury what the evidence was, thus invading the province of the jury.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to The United States Circuit Court of Appeals, for the Third Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all

of the proceedings in case numbered 7744 on its docket "*United States of America* v. *Joseph Friedman*," and that the said judgment of the Circuit Court of Appeals, for the Third Circuit, may be reversed and for such other and further relief as to the court may seem meet and proper.

JOSEPH FRIEDMAN,
Petitioner,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinion.

The Per Curiam opinion of the Circuit Court of Appeals for the Third Circuit was filed October 6, 1941, and appears at page 629 of the Record.

Jurisdiction.

The statement of the grounds on which the jurisdiction of this court is invoked is contained in the Petition for Writ of Certiorari, *supra,* (page 2).

Statement of the Case.

The statement of the case is contained in the Petition for Writ of Certiorari, *supra,* (page 2).

Specification of Errors.

The defendant urges the following assigned errors:

41. The trial court erred in admitting in evidence, over objection of the defendant, the partnership return of Daniels, Williams and Friedman for the year 1937, being exhibit G-4. (R. 613.)

42. The trial court erred in refusing to charge the jury as requested by the appellant as follows:

> First: The offenses charged in the indictment are wholly statutory in origin, and before you can find the defendant guilty of any such offense, you must be satisfied beyond a reasonable doubt that the Government has proved against the defendant each and every element of such offense as defined and described in the statute creating it. (R. 613.)

57. The trial court erred in charging the jury as follows:

> A reasonable doubt is not every doubt that may flit through your minds in considering the case. To justify acquittal it must be substantial in view of all the evidence and not a mere possibility of innocence. (R. 618.)

ARGUMENT.

Question 1.

A) Is a Partnership Income Return (G-4, R. 587-591), supposedly prepared, made, signed and filed by one co-partner admissible against a defendant,

B) Is it evidence of Willful evasion of the defendant's individual income tax,

C) Can the trial court say to the jury that "the partnership return was filed by the defendant and his partners"

When:

a) The partnership was engaged in a single illegal enterprise prohibited by a State statute, namely, gaming;

b) The defendant is charged with willful evasion of only his individual income tax;

c) There is no proof of guilty knowledge by the defendant of the preparation, making, signing or filing of the partnership return by his copartner;

d) There is no evidence that the defendant was an accessory before or after the fact to the preparation, making, signing or filing of the partnership return by his copartner?

The defendant was indicted for willfully evading his individual income tax for the years 1935 (count 1), 1936 (count 2), and 1937 (count 3).

When the first witness was called, the original Partnership Income Return (G-4) of "Daniels, Williams & Friedman" was offered in evidence and conceded. As an official document of the government, produced by an officer of the government, it was admissible, subject only to being connected with the defendant and the crimes charged. The only attempt to show such connection appears at pages 407 to 410 of the Record.

Consequently, the Record is utterly barren of any evidence showing that the defendant Friedman possessed any guilty knowledge of the fact that his copartner, Williams, either prepared, made, signed or filed such return. There is no evidence that the defendant was accessory before or after the fact to the preparing, making, signing or filing of the partnership return.

At the conclusion of all of the evidence, counsel for the defendant asked the court to exclude the partnership return, G-4, but it was admitted over defendant's objection and exception (R. 545-6).

In *Sleight* v. *U. S.* 87 F. 2d 459, 461, 65 App. D. C. 203, the court, in reversing a conviction of a partner for larceny, said:

> It is also urged by counsel for the government that Sleight and Hunter were copartners, and that Sleight is responsible for the acts of Hunter in taking the automobile from the government parking space to the Gist garage; and that any criminal delinquincy that Hunter may have been guilty of in connection with this transaction is chargeable to the defendant. *This is not the law.* A partner is not liable for the criminal acts of his copartner unless he possesses guilty knowledge of the criminal act of his copartner or is an accessory either before or after the fact. The liability of copartners in civil cases, for the acts of each other, respecting partnership affairs, does not attach to criminal transactions. (Italics supplied.)

In *Singer* v. *U. S.* (C. C. A. 3) 58 F. 2d 74, 76, (an income tax evasion case), the court held that the records of a corporation were inadmissible against the individual defendant where they were not properly identified. The court said:

> * * * Government Exhibit 94 likewise was inadmissible because it was not shown that the entries were made in the regular course of business, nor who the entrant was, nor whether or not he was available for testimony.

Still another grave error occurred in the charge to the jury respecting G-4, the partnership return. The Court said:

> For the year 1937, the defendant filed an income tax return on time, and it is for you to determine whether that return was correct or fraudulent. For that year a partnership return *was filed by the defendant and his partners,* Daniels and Leroy Williams. This return reported approximately $148,000 gross business. There

> has been testimony that the gross business for 1937 was between $255,000 and $312,000. If you believe from the evidence that the gross business of the partnership was substantially in excess of that reported on this partnership return, and that as a result the net income reported on the return was less than the true net income, you may find that the income reported by the defendant on his individual return was incorrect. *If you find* from all of the circumstances *that the defendant knew that a false partnership return was filed*, you may consider that as some evidence that he endeavored to evade his own income tax for the year 1937.

The words of that charge which are in italics show that the court first charged that the defendant actually filed the partnership return, and immediately thereafter left the same question to the jury to determine. The court invaded the province of the jury by stating the ultimate fact which the jury was later told to determine.

In the above charge the court made a document, which was improperly admitted in evidence, the basis upon which the jury could say whether the defendant's individual income tax was willfully evaded. If the partnership income return was inadmissible, there was no basis for the above instruction, it was clearly error.

QUESTION 2.

It is reversible error for the court to instruct the jury: "To justify an acquittal it (reasonable doubt) must be substantial in view of all the evidence and not a mere possibility of innocence"?

In *Boatright* v. *U. S.* (C. C. A. 8) 105 F. 2d 737, 740, (a mail fraud case), the court said:

> On the question of reasonable doubt, the court, among other things, said: "If, after all is said and done, there should arise in this case a reasonable doubt as to the guilt of the defendants, or either of them, it would be

> your duty to give them, or him, the benefit of such a doubt, and acquit him or them *as the doubt might justify or warrant you in doing.*"
>
> Just what is meant by the limitation "as the doubt might justify or warrant you in doing", is not clear, and we think that the defendants were entitled to an instruction without such limitation.

In *Paddock* v. *U. S.* (C. C. A. 9), 79 F. 2d 872, 876, (an income tax prosecution) the court held the following charge to be error:

> * * * Have you a conscientious belief that the defendant is not guilty? * * * Now if you are convinced that a certain thing is true, then you are not at liberty to conjure up and to question yourself, in fact. "Do I have a reasonable doubt about this?" That is not it at all. * * * You know whether you believe a thing or not. * * * Do you believe this? Each one asks himself, "Do you believe that?" * * * If you can say that you believe one way or the other on that. * * * If you believe those things, don't hesitate to say so.

Of that charge, the court said:

> The rule is stated in 16 C. J. 2405, P. 995: * * * "It has been held that defining belief beyond a reasonable doubt as consisting in a conscientious belief that accused is guilty is error."

It will be noted that after giving the charge we are here criticising, the court properly charged on reasonable doubt, and this in the very next sentence. However, which charge the jury followed cannot be determined.

In *Mills* v. *U. S.*, 164 U. S. 644, 649, 17 S. Ct. 210, 41 L. Ed. 484, the trial court gave conflicting instructions. In holding that to be error, this Court said:

> * * * Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we

> cannot escape the fear that the error above pointed out may have found lodgment in the minds of the jury. Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine, and as one of them was erroneous in not more fully and definitely stating what was the character of the non-consent which rendered the mere amount of force incident to the performance of the act itself sufficient to constitute the crime, the judgment of death must be reversed, and the defendant subjected to another trial where the rules of law applicable to the case shall be correctly and fully stated to the jury.

In *Nicola* v. *U. S.* (C. C. A. 3), 72 F. (2d) 780, 787, the court said:

> * * * Where two instructions are given to a jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn. *State* v. *Tapack*, 78 N. J. L. 208, 210, 211, 72 A. 962; *Rice* v. *Olin*, 79 Pa. 311; *Commonwealth* v. *Molten*, 230 Pa. 399, 407, 79 A. 638; *Drossos* v. *U. S.* 164 U. S. 644, 649, 17 S. Ct. 210, 41 L. Ed. 584.

To same effect: *Dr. J. H. McLean Medicine Co.* v. *U. S.* (C. C. A. 8), 253 Fed. 694, 165 C. C. A. 288.

QUESTION 3.

Where the defendant in a criminal trial requests the court to charge the jury that the burden of proving every material element of the crime charged, beyond a reasonable doubt, is upon the prosecution,—is it then sufficient for the court to state to the jury that which the court considers to be the material elements of the crime, yet (a) fail and refuse to tell the jury that all of those material elements must be proved beyond a reasonable doubt, and (b) state all of the material

elements of the crime in such a manner as to confound and confuse the jury?

The court was requested to charge (R. 565):

> First: The offenses charged in the indictment are wholly statutory in origin, and before you can find the defendant guilty of any such offense, you must be satisfied beyond a reasonable doubt that the Government has proved against the defendant each and every element of such offense as defined and described in the statute creating it.

That request was denied "as it was covered in the main charge" (R. 558). Exception was noted thereto (R. 561).

The court did charge that there were two elements in the crime charged, "two principal elements at least" one, that the defendant owed a tax and two, that he willfully attempted to evade it.

The court never did tell the jury that all of the material elements of the crime had to be proved beyond a reasonable doubt. That is what the defendant requested when he asked that the court charge "on each and every element" of the offense "as defined and described in the statute creating it." Nothing could have been more clearly brought to the attention of the court.

In *McAfee* v. *U. S.*, 105 F. (2d) 21, 31, 70 App. D. C. 142 (a homicide case), the court reversed for failure to charge as we here requested, saying:

> * * * The purpose of such an instruction is to impress upon the minds of the triers of fact the proposition that guilt depends upon demonstration beyond a reasonable doubt of the existence of each of the several elements which, as a matter of law, constitute the crime charged, rather than upon some vague general notion that the defendant did some sort of wrongful act. Such a construction is to be contrasted with those which tell a jury that they may not

convict if they have a reasonable doubt "upon the whole evidence" or that they may convict if "upon the whole evidence" they are convinced beyond a reasonable doubt of guilt. The instant case belongs to the latter type of instructions. The charge actually given to the jury in the instant case belongs to the latter type of instructions.

See also:

Spear v. *U. S.* (C. C. A. 8) 228 Fed. 485, 488;
Heard v. *U. S.* (C. C. A. 8) 228 Fed. 503, 504.

Immediately after the court instructed on reasonable doubt, the court told the jury that "willful" as used in the statute was used in "its ordinary and common meaning" (R. 554). Yet later the court charged that "willful" was not to be taken in its ordinary and common meaning, but that it meant "actual knowledge" and was "of the very essence of the statutory crime charged" (R. 559). Once again the jury was given contradictory charges. Undoubtedly, the latter charge is correct. *Hargrove* v. *U. S.* (C. C. A. 5) 67 F. (2d) 820, 823, a prosecution similar to the one at bar.

Consequently, we again invoke the rule of law, quoted *supra*: "where two instructions are given to a jury, one erroneous and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error." *Nicola* v. *U. S.*, *supra*.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals, for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all of the pro-

ceedings in the case numbered 7744 and entitled on its docket United States of America *v.* Joseph Friedman, and that the said judgment of the Circuit Court of Appeals, for the Third Circuit, may be reversed, and for such other and further relief as to the Court may seem meet and proper.

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(7258)

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN, ALIAS "ZENDEL" FRIEDMAN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In the Government's brief in opposition heretofore filed in this case it was contended that the information return filed for the year 1937 by the partnership of which the petitioner was a member was admissible in evidence and might properly be considered by the jury in accordance with the instructions of the trial court.[1] In support of this

[1] This return was originally admitted in evidence without objection (R. 93). Subsequently it was apparently objected to either on the ground of surprise or on the ground that it

contention three circumstances were briefly referred to, the relationship between the partnership return and the petitioner's individual return (R. 579), the false statements contained in the former as to the partnership income and the partners' distributive shares (R. 422–423), and the petitioner's knowledge of the incorrectness of the partnership return contemplated to be filed (R. 408–409). This supplemental memorandum is submitted for the purpose of setting forth in more detail the facts surrounding the 1937 partnership return, the petitioner's knowledge thereof, and the nature of the incorrectness of which he had knowledge.

The petitioner had a one-half share in the partnership, composed of himself, Daniels and Williams, which operated a numbers game at night during the first half of 1935 (R. 391). In June of that year this partnership combined with seven other numbers "banks," which operated in the daytime, to form an organization (R. 477) to control and operate the numbers game in Atlantic City (R. 392–398, 450). The purpose of this organization was "to inaugurate a new plan where everybody would put their business in to one and [sic] they knew that everybody would not go around and steal each other's business and pay extra odds to

---

had not been referred to in the indictment or in the opening or in the bill of particulars (R. 398–407). At the conclusion of all the evidence the petitioner objected to its admissibility and noted an exception (R. 546), but there was no motion to strike or to exclude the return from evidence.

the pick-up men * * *" (R. 393). The odds to be paid and the compensation of the "writers" and "pick-up" men were established (R. 393), an operating "bank roll" contributed to by each bank was set up (R. 394, 451), and generally the member banks "worked together" (R. 394).

The business of this organization was done in one office and was primarily handled by four men, although each member was "allowed one man to come in and work * * *" (R. 393). The daily receipts of all the banks were handled in the central office (R. 395, 450). The amounts taken in and paid out by each bank were recorded daily and totalled at the end of each week, when the profits were distributed (R. 452–453). The total profits of the organization were pooled and each member bank, including the bank in which petitioner was a partner, was entitled to receive one-eighth of the net profits without regard to the amount of business done by each bank (R. 394).

The partnership continued to be a member of this organization through 1936 and 1937 (R. 395). In 1937 the partnership received from the organization as its share of the net profits approximately $28,000, of which the petitioner received approximately $14,000 (R. 422).

The partnership return for 1937 (R. 587) did not reflect these facts. It was filed in the names of the petitioner, Daniels and Williams only and did not refer to the others in the organization. The income and expenses listed therein indicated

a business which was independently operated without reference to the organization and did not disclose the fact of receipt by the partnership of a share of the aggregate profits of the organization. It showed gross income of $148,143,[2] less deductions of $133,401, or a net income of $14,742 (R. 587). Among the deductions taken were "pay-outs" of $75,000 and payments to "writers" and "pick-ups" totaling approximately $48,000 (R. 591). The petitioner's distributive share of the net profits was stated to be $7,371, or 50 percent of the net income (R. 587). On his individual return for 1937 the petitioner reported this exact sum as income from "Daniels, Williams & Friedman" (R. 579).

The petitioner was familiar with and actively participated in the business both of the partnership and the organization of which it was a member. He was present at the organization meeting in June 1935 (R. 393), and was designated to represent the partnership's night bank (R. 421). For a time he held a part of the organization's "bank roll" (R. 398). In 1937 the petitioner was present "pretty

[2] The gross business actually done by the partnership's night bank alone in 1937 was between $255,000 and $312,000 (R. 136–137). Daniels testified that the daily net collection of the entire organization was from $3,500 to $4,500 for the day banks, or about $4,000 to $5,000, including the night bank (R. 396, 411–413). The game operated six days a week (R. 135), or, roughly, about 300 days a year. On this basis the net collection of the organization was between $1,200,000 and $1,500,000 a year. Since the net was about two-thirds of the gross (R. 118, 396), the total gross business was between $1,800,000 and $2,250,000 a year.

regularly" (R. 437) at its office on Saturday when the profits were distributed and received on behalf of the partnership's night bank its share of the organization net profits. In turn, he gave to Daniels and Williams their shares (R. 396, 412, 420, 437, 442, 457). At a previous trial involving the numbers operators the petitioner prevailed upon Daniels to give false testimony regarding the numbers business (R. 438–439, 443–444).

The question of income taxes and the filing of the 1937 partnership return were discussed in the presence of the petitioner just before the return was filed (R. 408–409). Daniels testified he told Williams and the petitioner that he "felt as though we were not filing our income correct, and that we should name all our partners, inasmuch as we were all in business together" (R. 409).

On the basis of these facts we believe that the question of the falsity of the partnership return and the petitioner's knowledge thereof were proper matters for the consideration of the jury. There was testimony that he knew that the proposed partnership return would not properly reflect the fact of the partnership's participation in the organization in that it would not name all partners who were in business together. In his individual return for 1937 (R. 579–585) he reported as net income from this partnership the exact amount shown as his distributive share in the partnership return (R. 587). By so doing he made the partnership return relevant and material and per-

mitted the inference that he was familiar with it. In view of his activities in the organization, his knowledge of the source of the partnership income and the amounts received by the partnership, the jury was entitled to consider the partnership return in connection with the question whether the partnership or the petitioner had received any unreported net income [3] and whether the petitioner did not in fact know that his distributive share was understated in that return. The return, therefore, was admissible.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DECEMBER 1941.

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[3] The partnership return was also necessary to show the petitioner's percentage of the partnership income.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN, ALIAS "ZENDEL" FRIEDMAN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 629)[1] is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 6, 1941 (R. 630). The petition for a writ of certiorari was filed November 8, 1941.

[1] Record references are to the printed Appendix to the petitioner's brief in the court below.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See, also, Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in an income-tax prosecution based upon an individual return, the trial court erred in receiving in evidence a partnership return upon which the individual return was based; and whether the court erred in charging the jury that if it found that petitioner knew that a false partnership return was filed, it might consider that some evidence of an endeavor to evade the individual income tax.

2. Whether the trial court erred in instructing the jury with respect to reasonable doubt that to justify an acquittal it must be substantial and "not a mere possibility of innocence."

3. Whether the trial court erred in refusing to give a requested instruction as to the elements of the offenses on trial on the ground that it was otherwise covered by the instructions given.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to

collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (U. S. C., Title 26, Sec. 145.)

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 145 (b) is identical with the above section.

SEC. 187. PARTNERSHIP RETURNS.

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

STATEMENT

The petitioner, a gambler of Atlantic City, New Jersey (Pet. 3; R. 553, 575–585), was indicted in the United States District Court for the District

of New Jersey (R. 9–17), and, after a trial before Judge Biggs and a jury (R. 27–574), was convicted of wilful attempts to evade and defeat his individual income taxes for the years 1935, 1936, and 1937, by failing to file returns and by filing false delinquent individual returns (R. 9–17, 626), in violation of Section 145 (b) of the Revenue Acts of 1934 and 1936, *supra*. Total sentences of ten years in a penitentiary and fines aggregating $20,000 were imposed (R. 627).

The petitioner admittedly was a member of a partnership known as "Daniels, Williams & Friedman" which was engaged in the "numbers" business in violation of the State law (Pet. 3). For the year 1937 a return was filed for this partnership, showing net income of $14,742, in which the petitioner had a 50% interest, amounting to $7,371. This return was signed by Williams on March 14, 1938, and filed on March 15, 1938 (Ex. G–4, R. 587–589). The petitioner, on March 15, 1938, signed his individual income tax return for 1937 (Ex. G–3, R. 579–585). The individual return reported, among other items, on the line for partnership income, the sum of $7,371 received from "Daniels, Williams & Friedman" and total net income of $6,861.47 for that year (R. 579). The indictment alleged receipt of net income of $13,490.47 for 1937 (R. 15). During the trial these and other returns for prior years were offered and received in evidence without objection (R. 92–93), although at the

conclusion of all the evidence the petitioner objected to the admissibility of the partnership return and noted an exception (R. 546). There was no motion to strike, or to exclude the return from evidence.

With respect to the partnership return the trial court charged the jury that if it believed from the evidence that the partnership income was understated it might find that the income reported by the petitioner on his individual return was incorrect; and that if it should find that the petitioner knew that a false partnership return was filed, that may be considered as some evidence that he endeavored to evade his own income tax for that year [2] (R. 556). No exception was taken to this portion of the charge. (See R. 561–565.)

The trial court previously had instructed the jury that there were at least two elements in the crimes alleged: first, whether the defendant owed a tax, and secondly, whether he willfully attempted to evade or defeat that tax. It further instructed that such an attempt "is an essential element of the crime and must be proven beyond a reasonable doubt" [3] (R. 554–555). No exception was noted to this charge, although an exception was taken to the court's refusal to grant the petitioner's first requested charge (R. 558, 565; Pet. Br. 16).

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[2] This portion of the charge is quoted in full, *infra*, p. 8.

[3] The court further charged the jury in this respect as shown at page 4 of the petition.

The trial court also instructed the jury with respect to reasonable doubt that "To justify acquittal it must be substantial in view of all the evidence and not a mere possibility of innocence."[4] An exception was noted (R. 565).

On appeal, the court below, on October 6, 1941, affirmed the judgment of conviction in a *per curiam* opinion, stating that an "examination of the record in this case fails to disclose any error which affected the substantial rights of the defendant" (R. 629).

ARGUMENT

The petitioner's contentions relate to the admissibility of the partnership return for 1937 and the charge of the trial court with respect to that return, the nature of reasonable doubt, and the elements of the offenses. These contentions are without merit.

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[4] This portion of the charge (R. 557) reads:

"A reasonable doubt is not every doubt that may flit through your minds in considering the case. To justify acquittal it must be substantial in view of all the evidence and not a mere possibility of innocence. It must be a doubt arising out of the evidence. A reasonable doubt exists where after the full consideration of all the evidence, your minds are left in such a condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge or charges. A reasonable doubt is not a strained or fanciful conjecture raised to escape the necessity of rendering an unpleasant verdict, but an actual, sincere mental hesitation caused either by insufficient or unsatisfactory evidence."

I

Petitioner concedes that the partnership return "was admissible, subject only to being connected with the defendant and the crimes charged" (Pet. Br. 11). He contends, however, that the return was inadmissible for the reason that the record fails to disclose that he had guilty knowledge of, or participated in, its preparation or filing.

The return in question was an information return filed by the partnership as required by Section 187 of the Revenue Act of 1936, *supra*. (R. 587–589). As such it had a direct bearing upon the petitioner's individual income tax return for 1937, which formed the basis of the prosecution for that year (R. 14–17). It showed the source of his income and his 50% interest in the partnership (R. 587) and he reported and admitted this connection in his individual return (R. 579). The petitioner himself, therefore, invited comparison with, and consideration of, the partnership return and made it relevant and material. Further, the petitioner's partner, Daniels, testified that the partnership return was false (R. 422–423) and that just before it was filed he had told the petitioner "* * * I felt as though we were not filing our income correct * * *" (R. 408–409). The return in question, therefore, was clearly admissible. Cf. *Parker*

v. *United States,* 203 Fed. 950 (C. C. A. 2d); *Wilson* v. *United States,* 190 Fed. 427 (C. C. A. 2d).

Since the return was admissible, there is no basis for the additional contention of the petitioner that the court erred in instructing the jury that if it found "from all of the circumstances that the defendant knew that a false partnership return was filed," it might "consider that as some evidence that he endeavored to evade his own income tax for the year 1937."[5] Further, no exception was taken to this charge. It was not specified as a ground of appeal (R. 600–602) or an assignment of error (R. 603–618) and was not argued in the court below.

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[5] The full instruction is as follows (R. 555–556):

"For the year 1937, the defendant filed an income tax return on time, and it is for you to determine whether that return was correct or fraudulent. For that year a partnership return was *filed by the defendant and his partners,* Daniels and LeRoy Williams. This return reported approximately $148,000 gross business. There has been testimony that the gross business for 1937 was between $255,000 and $312,000. If you believe from the evidence that the gross business of the partnership was substantially in excess of that reported on this partnership return, and that as a result the net income reported on the return was less than the true net income, you may find that the income reported by the defendant on his individual return was incorrect. *If you find from all of the circumstances that the defendant knew that a false partnership return was filed, you may consider that as some evidence that he endeavored* to evade his income tax for the year 1937. [Italics supplied.]

The point, therefore, is not available on appeal. *United States* v. *Breen,* 96 F. (2d) 782 (C. C. A. 2d), certiorari denied, 304 U. S. 585.

Moreover, this instruction, conditioned as it was upon a finding that the petitioner knew that a false partnership return was filed, was unexceptionable. The petitioner was charged with having knowingly received $14,000 from the "numbers" business, and wilfully and knowingly attempting to evade and defeat the income tax due thereon. (R. 14–17.) The partnership return reported gross income of $148,143, and the petitioner's share of net income as $7,371 (R. 587). There was evidence that the gross business was between $255,000 and $312,000. (R. 556.) The petitioner's partner, Daniels, told him that he felt they were not filing their income correctly (R. 408–409). A scheme or system of handling gambling income was involved and the question of the petitioner's knowledge, motive and intent in filing an individual return based upon the partnership return was correctly submitted to the jury. *Chadick* v. *United States,* 77 F. (2d) 961 (C. C. A. 5th), certiorari denied, 296 U. S. 609; *Fall* v. *United States,* 49 F. (2d) 506, 512–513 (App. D. C.), certiorari denied, 283 U. S. 867; *Malone* v. *United States,* 94 F. (2d) 281 (C. C. A. 7th), certiorari denied, 304 U. S. 562.[6]

[6] The petitioner, referring to the first italicized phrase in the charge in question also complains that the court invaded the province of the jury by stating that the return was in fact filed by the petitioner. When viewed in relation to the entire

II

The petitioner also contends that the trial court erred in instructing the jury in part that "To justify an acquittal it [reasonable doubt] must be substantial in view of all the evidence and not a mere possibility of innocence" (R. 557; Pet. 5–6; Br. 13–15). This statement, of course, must be considered in its relation to the entire charge with respect to reasonable doubt. (See footnote 4, page 6, *supra.*) The court instructed the jury, affirmatively, that "A reasonable doubt exists where after the full consideration of all the evidence, your minds are left in such a condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge or charges" (R. 557). Certainly the court was justified in advising the jury what did *not* constitute a reasonable doubt, and the charge given was correct. *Wilson* v. *United States,* 232 U. S. 563, 569–570; *Dunbar* v. *United States,* 156 U. S. 185, 199; *Hopt* v. *Utah,*

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charge, as of course it must be, the phrase in question obviously lends itself to no such criticism. It was employed simply to identify the return as the one made on behalf of the partnership. Any possible doubt as to its meaning is removed by the second italicized portion of the charge relating to a false return. Further, the return, in law and in fact, was filed by the partnership of which the petitioner was a member, and it was therefore filed by the partners, as stated by the court. (R. 555–556.) As the return was in accordance with the petitioner's return, and was not received as an admission of additional tax liability, it is immaterial who physically caused the return to be filed.

120 U. S. 430, 439–440. The decisions relied upon by the petitioner (Pet. 7, Br. 13–15) are not in point.

III

The petitioner also contends that the trial court erred in failing to advise the jury that before finding the petitioner guilty it must be satisfied beyond a reasonable doubt that the Government has proved each and every element of the offense (Pet. 7, Br. 15–17). As shown by the Statement, *supra,* page 5, and page 4 of the petition, the court carefully, fully and correctly analyzed the charges on trial, and, in substance, gave such an instruction (R. 554). *United States* v. *Murdock,* 290 U. S. 389, 394; *United States* v. *Miro,* 60 F. (2d) 58, 61 (C. C. A. 2d). The court then, by way of summary, repeated that "* * * a wilful attempt to evade and defeat payment of the tax is an essential element of the crime and must be proven beyond a reasonable doubt" (R. 555). As shown above, it further elaborated upon "reasonable doubt" (R. 557). In addition, the court granted the petitioner's second, fourth and sixth requested instructions, which further analyzed the elements of the offenses and definitely stated that the burden was upon the Government to show an intentional and wilful evading of the tax (R. 559). In view of these instructions, the petitioner's complaint can

only be that the court did not specifically state that the jury must be persuaded beyond a reasonable doubt that the petitioner owed a tax in excess of that reported. Clearly, however, the jury could not have possibly found beyond a reasonable doubt that the petitioner wilfully evaded his taxes without first finding beyond a reasonable doubt that he owed such taxes.

The suggestion that the charge with respect to wilfulness was confusing and contradictory (Pet. 6, Br. 17) is obviously without merit.

Accordingly, we submit that the requested instruction (Br. 16), which in itself was bad because vague and indefinite, was correctly refused for the reason stated, namely, "it was covered in the main charge" (R. 558) and in the petitioner's other instructions which were given (R. 559). The court was not required to charge in the exact language requested or to repeat instructions already given. *Agnew* v. *United States,* 165 U. S. 36, 51.

McAffee v. *United States,* 105 F. (2d) 21, 30 (App. D. C.), upon which petitioner apparently places his chief reliance (Pet. 7, Br. 16–17), involved a requested instruction with respect to reasonable doubt which "was not given either in terms or in substance in the charge."

CONCLUSION

The decision below is in all respects correct. There is presented neither an important question

nor a conflict of decisions. It therefore is respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.

J. LOUIS MONARCH,
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Special Assistants to the Attorney General.

DECEMBER 1941.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

JOHN H. BURNETT,
HARRY LEVIN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI

The Supplemental Memorandum For The United States is addressed to the point raised in petitioner's Question 1. We there contended that a Partnership Return of Income was not admissible in evidence against a partner indicted for willful evasion of his individual income tax, unless it was established [1] that the indicted partner either had guilty

[1] That is, established sometime before the case goes to the jury. As an official public record, produced by its lawful custodian, the Partnership Return was admissible, subject to being properly connected with the crime charged. The Partnership Return was not exhibited to the jury when it was first admitted (R. 92-3). The jury did not know its purport until advised thereupon by the instructions of the trial court. (R. 555-6). However, before the trial court so instructed the jury, timely objections were made to the admissibility of the Partnership Return (R. 398-407, 546). The suggestion that petitioner should have moved to strike the document is a step backward by the Government. Is not such a motion one of those highly technical tactics, which have been so frequently classified as archaic machinations of the common law?

knowledge of the Partnership Return, or was an accessory before or after the fact to the preparation, making, signing or filing of the Partnership Return. In its Supplemental Memorandum, the Government relies on "three circumstances" which make the Partnership Return admissible, (1) "the relationship between the partnership return and the petitioner's individual return"; (2) "the false statements contained in the former (partnership return) as to the partnership income and the partners' distributive shares;" and, (3) "the petitioner's knowledge of the incorrectness of the partnership return contemplated to be filed." (Memo. p. 2).

(1) "The relationship between the partnership return and the petitioner's individual return" is so distant that the degree of kindred can only be likened to a friend of the family who has been dubbed "cousin."

(2) "The false statements contained in the former (partnership return) as to partnership income and the partners' distributive shares" can only bind the defendant if and when he has been shown to have been a party thereto. Was the egg from the hen or the hen from the egg? Was the petitioner's individual return from the partnership return or was the partnership return from the individual return? There is an utter lack of a casual connection between the partnership return and the individual return.

(3) "The petitioner's knowledge of the incorrectness of the partnership return contemplated to be filed" was nil. True, the partners discussd *a* partnership return before any was filed. (R. 408). But, the partners were in disagreement as to the manner of making *a* return. The witness Daniels, (R. 409):

> I said I thought we were not filing the income tax correct and Rubenstein, who was in the presence of Friedman (petitioner), said that we were filing them correct as separate partners and *both of us thought we were right.*

Was the partnership return which was offered in evidence

the one of which the witness Dainels was speaking or the one of which Rubenstein was speaking?

Was the partnership return filed by Williams (R. 587) and admitted against this petitioner ever discussed with petitioner?

Leroy Williams "prepared the (partnership) return for 1937" and "got the figures together" (R. 410). Aside from suspicion, that is all that was proved in order to connect the petitioner with the Partnership Return.

It must be conceded that most of the sordid details of the criminal syndicate showing financial gain to the petitioner were admissible to prove his individual income and the falsity of his individual income tax return. However, that field has certain boundaries. No matter how damning those details were, before the partnership return was admissible, it had to have some probative force, some probative value.

The intimacy of the petitioner with the criminal activities of the syndicate could not prove his intimacy with the partnership return. Otherwise, we have an inference upon an inference, which is inadmissible.

The memorandum of the Government attempts to demonstrate that the partnership return was admissible because of circumstantial evidence. To prove motive and intent by circumstantial evidence, the circumstances adduced—either words or conduct,—must also have some probative value, and be capable of sustaining the belief of the jury that such fact or facts form a reasonable presumption or inference as to the principal fact in dispute.

Unquestionably, the partnership return was crudely false, prepared in order to defraud the government, filed with intent to evade taxes, and to hoodwink the Government, if possible.

Yet, there is an entire lack of competent evidence to prove that the petitioner had knowledge of or was a party to the preparation or the filing of that partnership return.

Nevertheless, it was admitted and characterized by the court as "filed *by the defendant* and his partners" (R. 555)

and the jury was told that it could be considered "as some evidence that he (petitioner) endeavored to evade his own income tax" (R. 556).

Petitioner was not charged with the offense of gaming. If he had been so charged, the labored reasoning of the Government's Supplemental Memorandum would be overwhelming.

The partnership return was, therefore, inadmissible and the instructions of the court thereon were error.

Respectfully submitted,

JOHN H. BURNETT,
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Counsel for Petitioner.